

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



BEVERLY HUGHES-LOCHE,

Charging Party,

v.

AFSCME, LOCAL 1587,

Respondent.

Case No. SF-CO-330-M

PERB Decision No. 2377-M

June 17, 2014

Appearance: Beverly Hughes-Loche, in propria persona.

Before Martinez, Chair; Huguenin and Winslow, Members.

DECISION¹

HUGUENIN, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Beverly Hughes-Loche (Hughes-Loche) from the dismissal (attached) by PERB's Office of the General Counsel of her unfair practice charge filed against AFSCME, Local 1587 (AFSCME) pursuant to the Meyers-Milias-Brown Act (MMBA).² In her charge, Hughes-Loche alleges that AFSCME violated its duty of fair representation³ when it failed to initiate a grievance on her behalf to challenge termination of her employment by the County of Santa Clara.

¹ PERB Regulation 32320(d) provides, in pertinent part: "Effective July 1, 2013, a majority of the Board members issuing a decision or order pursuant to an appeal filed under section 32635 [Board Review of Dismissals] shall determine whether the decision or order, or any part thereof, shall be designated as precedential." Having met none of the criteria enumerated in the regulation, the decision herein has not been designated as precedential. (PERB Regs. are codified at Cal. Code Regs., tit. 8, § 31001 et seq.)

² MMBA is codified at Government Code sections 3500 et seq.

³ Our precedents defining the duty of fair representation are applicable in cases arising under the MMBA. (*International Association of Machinists (Attard)* (2002) PERB Decision No. 1474-M.)

PERB's Office of the General Counsel dismissed the charge after determining that the charge failed to allege that AFSCME's failure to file a grievance challenging the termination was without a rational basis or devoid of honest judgment, and that as amended the charge did not cure this defect.

On appeal Hughes-Loche re-argues the facts she alleged below, urging us to reverse. We have reviewed the entire record and fully considered the relevant issues and contentions raised by Hughes-Loche's appeal. Based on this review, we conclude that the Office of the General Counsel's warning and dismissal letters are supported by the factual allegations made in the unfair practice charge, as amended. We further conclude that the warning and dismissal letters are well-reasoned and in accordance with applicable law, and that Hughes-Loche's appeal raises no issues warranting further consideration by the Board. Accordingly, we adopt the warning and dismissal letters as the decision of the Board itself.

ORDER

The unfair practice charge, as amended, in Case No. SF-CO-330-M is hereby
DISMISSED WITHOUT LEAVE TO AMEND.

Chair Martinez and Member Winslow joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD



San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: (510) 622-1139
Fax: (510) 622-1027



March 12, 2014

Beverly Hughes-Loche

Re: *Beverly Hughes-Loche v. AFSCME, Local 1587*
Unfair Practice Charge No. SF-CO-330-M

DISMISSAL LETTER

Dear Ms. Hughes-Loche:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on November 25, 2013. Beverly Hughes-Loche (Hughes-Loche or Charging Party) alleges that AFSCME, Local 1587 (Local 1587 or Respondent) violated the Meyers-Milias-Brown Act (MMBA or Act)¹ by denying her the right to fair representation.

Charging Party was informed in the attached Warning Letter dated February 18, 2014, that the above-referenced charge did not state a prima facie case. Charging Party was advised that, if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in that letter, she should amend the charge. Charging Party was further advised that, unless she amended the charge to state a prima facie case or withdrew it on or before March 4, 2014, the charge would be dismissed. A timely amended charge was filed on February 24, 2014.

In the original charge, Hughes-Loche alleged that she was terminated by the County of Santa Clara (County) for failing to complete a required Juvenile Corrections Officer Core (Core) training course, and that Local 1587 failed to file a grievance for her against the County.

In its response to the charge, Local 1587 asserted that it had agreed to the Core training requirement as part of its agreement to add extra help employees to its bargaining unit. Local 1587 further asserted that, although it had not filed a grievance, it had suggested to Hughes-Loche that she file an age discrimination suit.

The Warning Letter explained that the facts alleged in the original charge were insufficient to show that Local 1587's failure to file a grievance was without a rational basis or devoid of honest judgment, citing *International Association of Machinists (Attard)* (2002) PERB Decision No. 1474-M (*Attard*). The Warning Letter cited two grounds for this conclusion: first, that the charge did not allege facts suggesting that Hughes-Loche's age discrimination

¹ The MMBA is codified at Government Code section 3500 et seq. PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. The text of the MMBA and PERB Regulations may be found at www.perb.ca.gov.

claim was subject to the grievance procedure contained in the Memorandum of Agreement (MOA) between Local 1587 and the County; and second, that, even if such a claim would be grievable, pursuing such a grievance would have required Local 1587 to argue for an exception from its agreement that extra help employees would complete Core training. In addition, the Warning Letter noted, it appeared that Local 1587 had suggested an alternate remedy, i.e., an age discrimination suit.

In the amended charge, Hughes-Loche reiterates the same facts contained in the original charge, and provides additional documents regarding the charge of discrimination she filed with the Equal Employment Opportunity Commission (EEOC). In doing so, it appears that Hughes-Loche disputes Local 1587's assertion that it advised her to file an age discrimination suit. Rather, in both the original and amended charges, Hughes-Loche alleges that she was advised "to write to [County Deputy Chief Probation Officer Richard] DeJesus, and if he didn't respond, 'sue him.'"²

Because there appears to be a dispute of fact, Hughes-Loche's allegation regarding Local 1587's advice must be accepted as true. (*UPTE, CWA Local 9119 (Crisosto)* (2006) PERB Decision No. 1811-H.) Nevertheless, the fact that Local 1587 did not specifically advise Hughes-Loche of her right to file an age discrimination suit does not establish a breach of the duty of fair representation. The duty of fair representation does not require a union to inform employees of the existence of non-contractual remedies. (*Union of American Physicians and Dentists (Schuman)* (2000) PERB Decision No. 1372-S.)

Moreover, the factual dispute regarding Local 1587's advice does not cure the other deficiencies identified in the Warning Letter. The amended charge does not contain any additional facts suggesting that an age discrimination claim was subject to the grievance procedure. Nor does the amended charge dispute that the Core training requirement was agreed to by Local 1587 when extra help employees were added to its bargaining unit.³

In addition, there is no indication from the facts alleged in the original or amended charge that Local 1587 did not explain its reasons for not filing a grievance against the County. (*IBEW Local 1245 (Flowers)* (2009) PERB Decision No. 2079-M.)

² The amended charge does not specifically state that Hughes-Loche disputes Local 1587's assertion. However, Hughes-Loche raised this factual dispute in a telephone conversation with the undersigned after the amended charge was filed.

³ A Board agent may rely on facts asserted by the respondent that do not conflict with the facts in the charge. (*Chula Vista Elementary School District* (2003) PERB Decision No. 1557.)

Because the amended charge thus continues to fail to allege sufficient facts to show that Local 1587's failure to file a grievance was without a rational basis or devoid of honest judgment, it is dismissed. (*Attard, supra*, PERB Decision No. 1474-M.)

Right to Appeal

Pursuant to PERB Regulations, Charging Party may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (Cal. Code Regs., tit. 8, § 32635, subd. (a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of PERB Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal. (Cal. Code Regs., tit. 8, § 32635, subd. (b).)

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, § 32140 for the required contents.) The document will be considered properly "served" when personally delivered or deposited in the mail or deposited with a delivery service and properly addressed. A document may also be concurrently served via facsimile transmission on all parties to the proceeding. (Cal. Code Regs., tit. 8, § 32135, subd. (c).)

Extension of Time

A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party. (Cal. Code Regs., tit. 8, § 32132.)

Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Sincerely,

M. SUZANNE MURPHY
General Counsel

By _____
Joseph Eckhart
Regional Attorney

Attachment

cc: Mark Murray

PUBLIC EMPLOYMENT RELATIONS BOARD



San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: (510) 622-1139
Fax: (510) 622-1027



February 18, 2014

Beverly Hughes-Loche

Re: *Beverly Hughes-Loche v. AFSCME, Local 1587*
Unfair Practice Charge No. SF-CO-330-M
WARNING LETTER

Dear Ms. Hughes-Loche:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on November 25, 2013. Beverly Hughes-Loche (Hughes-Loche or Charging Party) alleges that AFSCME, Local 1587 (Local 1587 or Respondent) violated the Meyers-Milias-Brown Act (MMBA or Act)¹ by denying her the right to fair representation.

FACTS AS ALLEGED

Hughes-Loche was previously employed by the County of Santa Clara (County) Probation Department as an "extra help" group counselor. That position is included in a bargaining unit exclusively represented by Local 1587.

Local 1587 and the County are parties to a memorandum of agreement (MOA) that contains a grievance procedure.

By agreement of the County and Local 1587, extra help employees were added to Local 1587's bargaining unit in October 2011. The parties agreed that extra help employees would be required to complete, at the County's expense, the Juvenile Corrections Officer Core training course, in order to become sworn peace officers.

On January 22, 2013, Hughes-Loche sent a letter to Richard DeJesus (DeJesus), the Deputy Chief Probation Officer. In the letter, Hughes-Loche asserted that, because she was 70 years old, she should not be required to take the Core training course. Hughes-Loche noted that she had never been provided the training in the past, despite repeated requests.

On June 18, 2013, Hughes-Loche was informed by e-mail message that she was required to attend the Core training scheduled in August 2013, and that if she did not, she would be released by the County.

¹ The MMBA is codified at Government Code section 3500 et seq. PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. The text of the MMBA and PERB Regulations may be found at www.perb.ca.gov.

On June 24, 2013, Hughes-Loche sent a letter to Mark Murray (Murray), the president of Local 1587, requesting assistance with the matter.

On an unspecified date, Hughes-Loche met with Murray and Louis Silver (Silver), Local 1587's attorney. Silver suggested that Hughes-Loche file an age discrimination lawsuit against the County. However, Local 1587 declined to file a grievance over the matter.

On August 1, 2013, Hughes-Loche sent a letter to Diana Teves (Teves), a Probation Manager. Hughes-Loche requested to be excused from the Core training course because of her recent foot surgery.

On August 5, 2013, DeJesus sent a letter to Hughes-Loche informing her that because of her failure to take the Core training course, she was being released from her duties.

Following her release, Hughes-Loche filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC). On November 4, 2013, Hughes-Loche requested that the EEOC issue her a "Notice of the Right to Sue."

DISCUSSION

I. Charging Party's Burden

PERB Regulation 32615(a)(5) requires, inter alia, that an unfair practice charge include a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." The charging party should include sufficient facts alleging the "who, what, when, where and how" of an unfair practice. (*State of California (Department of Food and Agriculture)* (1994) PERB Decision No. 1071-S, citing *United Teachers-Los Angeles (Ragsdale)* (1992) PERB Decision No. 944.) Mere legal conclusions are not sufficient to state a prima facie case. (*Ibid.*; *Charter Oak Unified School District* (1991) PERB Decision No. 873.)

II. Duty of Fair Representation

The charge alleges that Local 1587 denied Hughes-Loche the right to fair representation guaranteed by the MMBA.

While the MMBA does not expressly impose a statutory duty of fair representation upon employee organizations, the courts have held that "unions owe a duty of fair representation to their members, and this requires them to refrain from representing their members arbitrarily, discriminatorily, or in bad faith." (*Hussey v. Operating Engineers* (1995) 35 Cal.App.4th 1213, 1219 (*Hussey*)). In *Hussey*, the court further held that the duty of fair representation is not breached by mere negligence and that a union is to be "accorded wide latitude in the representation of its members . . . absent a showing of arbitrary exercise of the union's power." (*Ibid.*)

With regard to when “mere negligence” might constitute arbitrary conduct, the Board has observed that, under federal precedent, a union’s negligence breaches the duty of fair representation “in cases in which the individual interest at stake is strong and the union’s failure to perform a ministerial act completely extinguishes the employee’s right to pursue his claim.” (*Coalition of University Employees (Buxton)* (2003) PERB Decision No. 1517-H, quoting *Dutrisac v. Caterpillar Tractor Co.* (9th Cir. 1983) 749 F.2d 1270, 1274.)² But if the employee may pursue a grievance on his own, and the union’s conduct does not prevent the employee from doing so, there is no breach of the duty of fair representation. (*California School Employees Association & its Chapter 724 (Davis)* (2011) PERB Decision No. 2208.)

Thus, in order to state a prima facie violation of the duty of fair representation under the MMBA, a charging party must at a minimum include an assertion of facts from which it becomes apparent in what manner the exclusive representative’s action or inaction was without a rational basis or devoid of honest judgment. (*International Association of Machinists (Attard)* (2002) PERB Decision No. 1474-M (*Attard*).) The burden is on the charging party to show how an exclusive representative abused its discretion, and not on the exclusive representative to show how it properly exercised its discretion. (*United Teachers – Los Angeles (Wylar)* (1993) PERB Decision No. 970.)

Based on the facts alleged, it does not appear that Local 1587’s refusal to file a grievance against the County was without a rational basis or devoid of honest judgment. (*Attard, supra*, PERB Decision No. 1474-M.) The charge does not allege any facts suggesting that an age discrimination claim would be subject to the MOA’s grievance procedure. Even if it would be, however, filing such a grievance would have required Local 1587 to argue for an exception to its agreement that extra help employees would complete the Core training course. Nevertheless, as Hughes-Loche acknowledges, Local 1587 suggested that she file an age discrimination lawsuit against the County.³ Under these circumstances, it cannot be concluded that Local 1587’s conduct was arbitrary, discriminatory, or in bad faith. (*California Nurses Association (Rosa)* (2011) PERB Decision No. 2182-M [no breach of duty where union advised individual of possible remedies with Department of Fair Employment and Housing].) As a result, the charge fails to allege facts establishing a breach of Local 1587’s duty of fair representation. (*Hussey, supra*, 35 Cal.App.4th 1213.)

² The Board has determined that precedent defining the duty of fair representation under the other statutes administered by PERB is applicable to cases arising under the MMBA. (*International Association of Machinists (Attard)* (2002) PERB Decision No. 1474-M.)

³ Local 1587 did not have a duty to file such a lawsuit for Hughes-Loche, as it is not a contractually-based remedy under Local 1587’s control. (*California School Employees Association (Garcia)* (2001) PERB Decision No. 1444.)

For these reasons the charge, as presently written, does not state a prima facie case.⁴ If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, Charging Party may amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by an authorized agent of Charging Party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the Respondent's representative and the original proof of service must be filed with PERB. If an amended charge or withdrawal is not filed on or before March 4, 2014,⁵ PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Joseph Eckhart
Regional Attorney

JE

⁴ In *Eastside Union School District* (1984) PERB Decision No. 466, the Board explained that a prima facie case is established where the Board agent is able to make "a determination that the facts as alleged in the charge state a legal cause of action and that the charging party is capable of providing admissible evidence in support of the allegations. Consequently, where the investigation results in receipt of conflicting allegations of fact or contrary theories of law, fair proceedings, if not due process, demand that a complaint be issued and the matter be sent to formal hearing." (*Ibid.*)

⁵ A document is "filed" on the date the document is **actually received** by PERB, including if transmitted via facsimile. (PERB Regulation 32135.)